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Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS,

Petitioner,

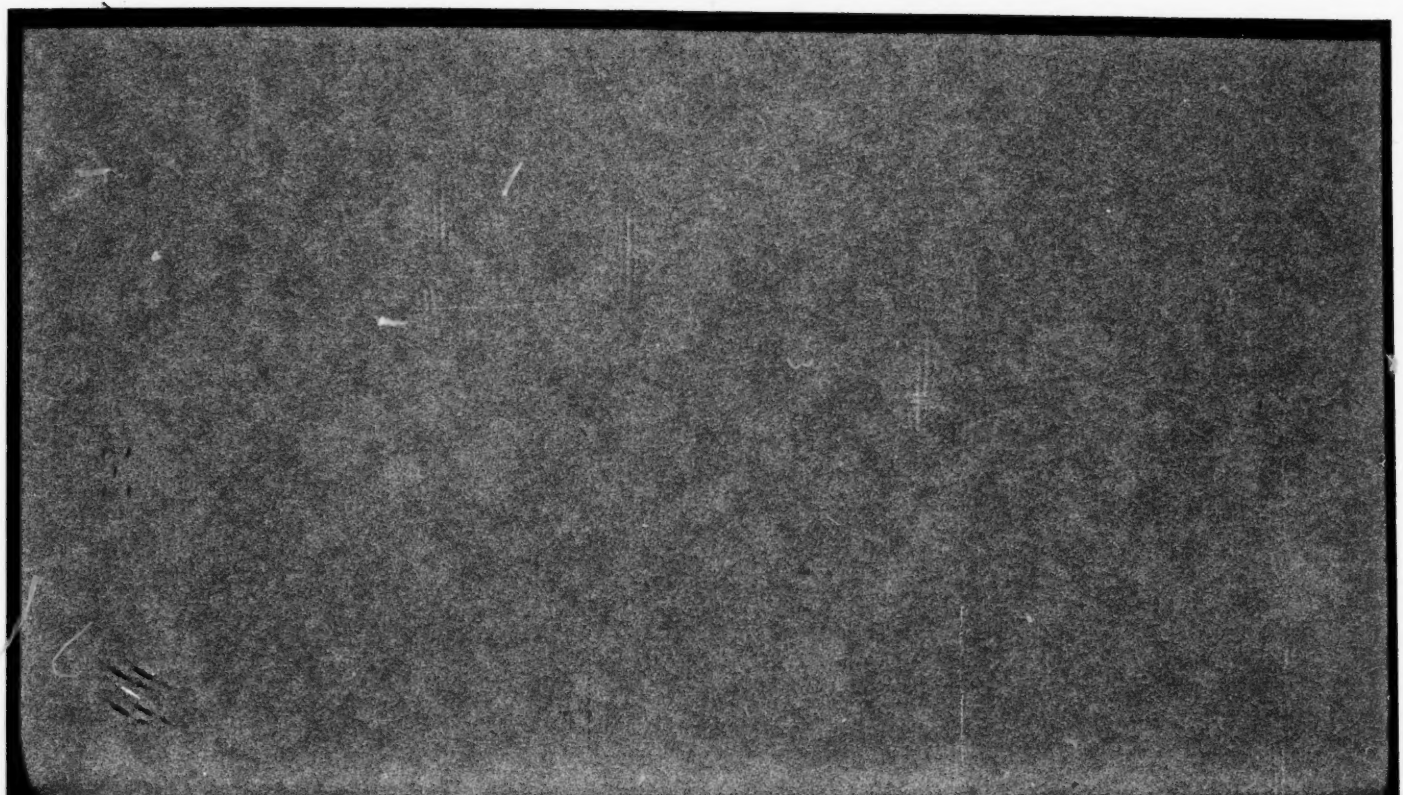
against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY MORSE,
Counsel for Petitioner.



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The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in the above entitled case on March 7, 1951.

Opinions Below

The opinion of the District Court (R. 11-16) is reported in 92 F. Supp. 322. The memorandum opinion (R. 17) is unreported. The opinion of the Circuit Court of Appeals (R. 41-46) is reported in 187 F. 2d 610.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 7, 1951 * (R. 46). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1)

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* The time for filing this petition was extended by order of Mr. Justice Robert H. Jackson to August 2, 1951.

Questions Presented

(1) Where the National Service Life Insurance Act makes provision for "* * * extended values * * *" may the Government, after the death of the insured promulgate a regulation which would modify the terms of the insurance contract so as to compel the beneficiary to accept cash in lieu of extended term insurance.

(2) Whether the Administrator may limit the applicability of the nonforfeiture provision as to "* * * extended values * * *" granted by the National Service Life Insurance Act to a specific class of policyholders.

(3) Whether the Government may charge the moneys that veterans had to their credit on deposit in the National Service Life Insurance Fund towards the payment of mortality liabilities from the date of lapse to the date dividends were declared without giving them insurance for their money.

(4) Whether a large class of veterans are bound by regulations that were published in the Federal Register after their death.

Statute Involved

Section 602(f) (38 U. S. C. A. 802(f)) * of the National Service Life Insurance Act states in part:

> "* * * Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator."

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* Appendix pages 10, 11.

Statement

This is a suit on two certificates of level premium National Service Life Inusrance (R. 4). The policies lapsed on March 31, 1947 (R. 7). The complaint (Par. 20, R. 6) states in part " * * * the unearned premiums, reserve and divisible surplus on March 31, 1947, was more than sufficient to pay for insurance on the face amount of the certificate for a period subsequent to the 27th day of August, 1948, * * * ". The insured died on August 27, 1948 (R. 4).

The complaint was dismissed for failure to state a claim upon which relief could be granted by the order of Mr. Justice Robert A. Inch (E. D. N. Y.) (R. 18). The Court below affirmed the orders of the District Court (R. 46).

Specification of Errors to be Urged

(1) In holding that after the death of the insured the Government may modify the terms of an insurance contract without the veteran's consent.

(2) In overlooking that portion of two regulations which provided for extended term insurance.

(3) In overlooking that portion of the National Service Life Insurance Act which made provision for " * * * extended values * * * ".

(4) In affirming the order of the District Court which limited the applicability of the nonforfeiture provision as to " * * * extended values * * * " to a specific class of policyholders.

(5) In holding that the National Service Life Insurance Act did not make provision for lapsed policies.

(6) In affirming the orders of the District Court.

Reasons for Granting the Writ

This decision will affect many dependents of veterans who allowed their policies to lapse and who died before May 28, 1949, the date dividends were declared. Petitioner has been informed that there were numerous actions, and that there are now a number of claims pending in the various states involving the issues in the present case, and believes that widespread litigation will continue until the point is settled by this Court.

In holding that after the death of a veteran the Government may promulgate a regulation as to dividends, when no dividends were declared during the veteran's lifetime, so as to modify the terms of an insurance contract changing it into a banking contract, the Court below has decided a question of importance in Federal law in a manner inconsistent with the decisions of this Court, contrary to the intent of Congress and the Fifth Amendment of the Constitution of the United States.

The Court below referred to four regulations. Petitioner shall now address herself to the regulation of May 28, 1949 (14 F. R. 2832) (38 C. F. R. 1949 Ed. Sec. 8.26a),* promulgated after the death of the foregoing veterans which states in part: " * * * any special dividend * * * shall be paid in cash only * * * ".

The Government having accepted the veteran's premiums for insurance equal to the face value of the policies, and the foregoing veterans having died before dividends were declared, the rights of the parties became fixed and vested. (*Jones* v. *Union Central Life Ins. Co.* 265 App. Div. 388, affd. 290 N. Y. 883; *American National Bank and Trust Co. of Chicago* v. *United States,* C. C. A. 7th, 159 F. 2d, 188). The Government was therefore obligated by contract to give the beneficiaries of the foregoing policies insurance equal to the face value of the policy for such period as the

* Appendix page 11.

cash value of the policy on the date of lapse would purchase.

The Court below then referred to (R. 44, fol. 45) " * * * an earlier regulation, 38 C. F. R. 1949 Ed. Sec. 8.26 * * *".* The Court below overlooked the part which provided:

> "Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 8.29 (a) and 8.30, respectively * * *."

The foregoing regulation was also promulgated after the death of the insured (R. 4) (F. R. September 16, 1948, p. 5399, Vol. 13, No. 181). In holding that the regulations that were published in the Federal Register on September 16, 1948 (R. 44) and May 28, 1949 (R. 44) after the death of the insured were binding on all those veterans who died prior to those dates the Court below has deprived that large class of veterans of vested property rights. The Court below has created a precedent which would allow the Administrator to deprive future veterans and their beneficiaries who may fall within the aforementioned class of vested property rights.

Petitioner argues that the ruling of this Court in the case of *Federal Crop Ins. Corp.* v. *Merrill et al.*, (Oct. 16, 1947) 332 U. S. 380, did not contemplate to bind veterans whose lives were shortened due to service to their country, with regulations that were promulgated in the Federal Register after their death.

Therefore that class of veterans who died before the promulgation of the aforesaid regulation could not give written notice as to what should be done with the dividends that were declared years after their death when they were never apprised during their lifetime that they would be entitled to receive dividends.

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* Appendix pages 11, 12.

The Court below stated in its opinion (R. 44, 45; fol. 45):

> " * * * she is not relying upon declared and accumulated dividends, but rather upon Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * * "

The Court below in the footnote numbered "2" (R. 44) then referred to regulation " * * * 38 C. F. R., 1947 Supp., Sec. 10.3426 * * * " which appeared in the Fed. Reg. April 1, 1947, Vol. 12, p. 2129,* which also contained a provision as to extended term insurance, and which both the District Court (R. 14) and the Court below overlooked (R. 45), and which provided:

> "Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Sections 10.3429 and 10.3430, respectively. * * * "

As the foregoing two regulations were promulgated before the declaration of any dividends the natural construction would be that the accumulation of undeclared dividends " * * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * * " which is consistent with the allegations of the complaint.

Petitioner respectfully submits that the Court below therefore committed error in overlooking the provisions in the aforesaid regulations which provided: " * * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * * "

As to the regulation 10.3416, cited by the Court below (R. 44), it provided: "If any premium be not paid when

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* Appendix page 12.

due, the National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy."

It has been shown that the National Service Life Insurance Act provided for "extended values" and two of the regulations relied on by the Court below provided for "* * * extended term insurance * * *."

The policy lapsed on March 31, 1947. On November 1, 1947, the following regulation appeared in the Federal Register (Vol. 12, No. 215) at page 7115:*

> "Sec. 10.3105. *Provision for extended term Insurance* After the expiration of the first policy year and upon default in the payment of a premium within the grace period, if a United States Government life insurance policy has not been surrendered for cash or paid up insurance, the policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the insured. * * * The extended term insurance shall be with right to dividends, payable in cash only, * * *."

Petitioner made the foregoing regulation the basis of her motion for reargument (R. 29-31). Petitioner argued both in the District Court and the Court below that as Section 602 (f) of the National Service Life Insurance Act provided for "* * * extended values * * *" and the Administrator, having acted subsequent to the enactment of the National Service Life Insurance Act, was duty bound to act in accordance with the intent of Congress and not limit the nonforfeiture provision as to "* * * extended values * * *" to any specific policyholders.

According to the 1950 annual report of the Administrator of Veterans Affairs at page 87, there are at present 63,208 "five-year level premium term" United States Gov-

* Appendix page 13.

ernment Life Insurance policies. As the foregoing regulation does not limit the applicability to any specific plan these policyholders will have the benefit of extended insurance.

The Administrator's annual report for 1949 at page 74 states that there are 48,370 National Service Life Insurance policies in force as "extended insurance."

Petitioner argues that if the facts warrant it and Section 602 (f) of the National Service Life Insurance Act does not limit the applicability of the provision for "* * * extended values * * *" to any specific plan of insurance, why should the Administrator attempt to deprive one class of veterans of their vested property rights to receive insurance for their money at the date of lapse just because that class of policyholders have policies of a different name?

Section 605 (a) (38 U. S. C. A. Sec. 805(a)) * of the Act states in part:

> "* * * All premiums paid * * * shall be deposited * * * to * * * such fund, which * * * shall be available for the payment of liabilities * * *."

Those veterans who allowed their policies to lapse therefore had on deposit to their credit in the National Service Life Insurance Fund on the date of lapse an amount of money proportionate to the premiums they paid towards the creation of the fund. This money therefore remained in the fund from the date of lapse until dividends were declared. These veterans and the beneficiaries of deceased veterans therefore contributed towards the payment of liabilities from the date of lapse until dividends were declared.

Since the regulation of May 28, 1949 (14 F. R. 2832; 38 C. F. R. 1949, Sec. 8.26 a) † which declared the first dividend on National Service Life Insurance, thousands of veterans have allowed their policies to lapse. These veterans and

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* Appendix page 14.

† Appendix page 11.

the beneficiaries of deceased veterans also had money on deposit to their credit in the National Service Life Insurance Fund on the date their policies lapsed. This class of veterans and the beneficiaries of deceased veterans will therefore have to contribute towards the payment of mortality liabilities that were charged to the National Service Life Insurance Fund from the date of lapse until the date the Administrator decides to declare a second dividend, as all mortality liabilities were payable out of the National Service Life Insurance Fund (Sec. 605 (a) of the National Service Life Insurance Act).

This situation will again be created to that class of veterans who will allow their policies to lapse after the declaration of the second dividend. This situation will be created ad infinitum until this Court decides the rights of the veterans who had on deposit to their credit moneys in the National Service Life Insurance Fund on the date their policies lapsed.

The Court below stated (R. 45):

> "* * * there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. * * *"

This open question will cause endless litigation until this Court finally determines the intent of Congress when they wrote Section 602(f) of the National Service Life Insurance Act and made "* * * Provisions for cash, loan, paid up, and extended values, * * *".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

APPENDIX

Sec. 602(f) (38 U. S. C. A. 802(f))

Act of Oct. 8, 1940, as amended by sec. 3, Public Law 589, 79th Cong. Aug. 1, 1946, by sec. 2, Public Law 5, 80th Cong., Feb. 21, 1947, and by Public Law 838, 80th Cong., June 29, 1948.

(f) Such insurance may be issued on the following plans: Five-year level premium term,[16] ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five. Level premium term insurance may be converted as of the date when any premium becomes or has become due, or exchanged as of the date of the original policy, upon payment of the difference in reserve, at any time while such insurance is in force and within the term period to any of the foregoing permanent plans of insurance, except that conversion to an endowment plan may not be made while the insured is totally disabled. All level premium term policies, except as provided below, shall cease and terminate at the expiration of the term period: *Provided,* That at the expiration of the term period any national service life insurance policy which was issued on a five-year level premium term plan before January 1, 1948, and which has not been exchanged or converted to a permanent plan of insurance, may be renewed as level premium term insurance for an additional period of five years at the premium rate for the then attained age without medical examination, provided. the required premiums are tendered prior to the expiration of the first term period: *Provided further,* That in any case in which the insured is shown by evidence

[16] The 5-year term policies issued prior to December 31, 1945, were extended for an additional period of 3 years. (See appendix, Public Law 118, 79th Cong.)

satisfactory to the Administrator to be totally disabled at the expiration of the level premium term period of his insurance under conditions which would entitle him to continued insurance protection but for such expiration, such insurance, if subject to renewal under this provision, shall be automatically renewed for an additional period of five years at the premium rate for the then attained age, unless the insured has elected insurance on some other available plan. Provisions for cash, loan, paid-up, and extended values, dividends from gains and savings refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

Section 8.26(a), Title 38, C. F. R. (Fed. Reg., Vol. 14, p. 2832, published May 28, 1949), provides as follows:

SPECIAL DIVIDENDS—Any special National Service Life Insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.

38 C. F. R. 8.26 F. R. Sept. 16, 1948, p. 5399, Vol. 13, No. 181

Sec. 8.26 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' affairs. Any such dividend shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends

shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid up insurance as provided in Sections 8.29(a) and 8.30 respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash to the person currently entitled to receive payments under the policy.

F. R. April 1, 1947, page 2129, Vol. 12, No. 64

Sec. 10.3426 DIVIDENDS. A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in Secs. 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds.

(Secs. 601-618, 54 Stat. 1008-1014; 38 U. S. C. 801-818.)

F. R. Nov. 1, 1947, Vol. 12, No. 215, at page 7115

PART 10—INSURANCE

MISCELLANEOUS AMENDMENTS

The following amendments are made to Part 10:

EXTENDED INSURANCE

Sec. 10.3105 PROVISION FOR EXTENDED TERM INSURANCE. After the expiration of the first policy year and upon default in the payment of a premium within the grace period, if a United States Government life insurance policy has not been surrendered for cash or for paid-up insurance, the policy shall be extended automatically as term insurance for an amount of insurance equal to the face value of the policy less any indebtedness for such time from the due date of the premium in default as the cash value less any indebtedness will purchase when applied as a net single premium at the attained age of the insured. For this purpose the attained age is the age nearest birthday anniversary as of the effective date of the policy plus the number of years and months from that date to the date the extended term insurance becomes effective. The extended term insurance shall be with right to dividends, payable in cash only, and with right to total permanent disability benefits. The number of monthly installments payable upon due proof of total permanent disability or death of the insured under such extended term insurance will be the same as would then be payable under the policy. The extended term insurance shall not have a loan value, but shall have a cash value. (Secs. 5, 300, 301, 43 Stat. 608, 624, as amended, secs. 1, 2, 46 Stat. 1016; 38 U. S. C. 11, 11a, 426, 511, 512.)

Sec. 605(a) of the National Service Life Insurance Act, 38 U. S. C. A. Sec. 805(a)

Act of Oct. 8, 1940

Sec. 605. (a) There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 11) and that court's supplemental opinion (R. 17) are reported at 92 F. Supp. 322, 325. The opinion of the Court of Appeals for the Second Circuit (R. 41) is reported at 187 F. 2d 610.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1951 (R. 46). The time for fil-

ing the petition for a writ of certiorari was extended by order of Mr. Justice Jackson to August 2, 1951. The petition was filed on June 13, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

A veteran, while in service, took out two policies of level premium term National Service Life Insurance. He paid no premiums on that insurance after March 31, 1947. He died about 17 months later, on August 27, 1948. At the time of his death, no dividends had been declared on National Service Life Insurance policies by the Veterans Administration. Subsequently, the Veterans Administration declared a special dividend, the veteran's share of which was larger than the sum of the premiums he would have paid had he kept his policies in force until he died. The questions presented are:

1. Whether the National Service Life Insurance Act requires that the dividends, when declared, be retroactively applied to revive the veteran's lapsed policies even though the regulations of the Veterans' Administrator specifically provide that such dividends shall be paid in cash only.

2. Whether, because of the failure of the Administrator to declare dividends during the veteran's lifetime, the United States is now estopped to deny that the veteran's policies were in effect at the time of his death.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of Sections 602(f), 605(a) and 608 of the National Service Life Insurance Act (54 Stat. 1008, 38 U.S.C. §§ 802(f), 805(a), 808) and of the Regulations of the Veterans Administration (38 C.F.R. (1949) § 8.26, 38 C.F.R. (1949 Supp.) § 8.26a) are set forth in the Appendix, *infra,* pp. 12-15.

STATEMENT

Petitioner is the sister of a deceased veteran, Eugene Morse, who, while serving in the Armed Forces of the United States, took out two certificates of level premium term National Service Life Insurance, each for $5,000, naming her as beneficiary (R. 3, 4, 9). The veteran was honorably discharged on December 7, 1945, and died on August 27, 1948, having failed to pay the premiums on the insurance after March 31, 1947—a period of about 17 months (R. 11). Petitioner brought this suit to recover the proceeds of those certificates.

It is not disputed that the veteran paid no premiums on the policies after March 31, 1947. Petitioner, in her complaint, sought to avoid the effect of the non-payment of premiums by claiming, first, that the veteran was totally disabled during the period during which premiums were not paid, and that the premiums should, therefore, under the National Service Life Insurance Act,[1] be deemed

[1] The district court found, and the court of appeals agreed, that the complaint wholly failed to state that the veteran had complied with the requirements of the Act itself and of the

to have been waived; and, second, that at the time of his death the veteran was owed by the United States the as yet undetermined amount of dividends subsequently declared on his policies by the Veterans Administration, and that, as a matter of law, the United States was required retroactively to apply those dividends to keep the insurance in effect as long as possible. The United States moved to dismiss the complaint for failure to state a cause of action (R. 2), and the district court granted the motion (R. 18). On appeal, that judgment was affirmed (R. 46).

ARGUMENT

Petitioner must, if she is to recover, overcome the defense that the insured had failed to pay premiums for some seventeen months prior to his death. She seeks, in this Court, to avoid the effect of the nonpayment of premiums on two theories: she first argues that the National Service Life Insurance Act requires that dividends, when declared, must be retroactively applied to keep lapsed policies in effect as long as possible. Her second contention is that when the veteran made his last payment, his policies had a reserve equal to the amount of the unpaid and undeclared dividends, that the United States used that money to pay benefits on other policies and, therefore, that the United States is now estopped from denying

Veterans Administration's regulations governing the waiver of premiums. Petitioner does not urge in this Court that that holding was erroneous.

that the insurance was in effect at the time of the veteran's death. These questions have been raised in lower courts in a number of cases. The decisions of those courts[2] have been unanimously in accord with that reached here, and there is thus no conflict calling for resolution. Moreover, the decision below is in all respects correct.

1. Petitioner's first contention, that the National Service Life Insurance Act requires that the deceased veteran be paid his dividends in the form of extended term insurance to the date of his death, is untenable. The only provisions of the National Service Life Insurance Act which bear on this point are Sections 602(f) and 605(a). The former provides in relevant part:

> * * * Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions *as may be found to be reasonable* and practicable, *may be* provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator. [Italics added.] [3]

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[2] Those decisions are: *Jones* v. *United States* (C.A. 8, decided June 1, 1951); *Ferrara* v. *United States* (D.D.C., decided February 23, 1950); *Hollowell* v. *United States* (E.D. Tex., decided May 6, 1950); *Layson* v. *United States* (M.D. Ga., decided November 29, 1950); *Fitzgerald* v. *United States* (N.D. Ohio, decided March 28, 1951); *Parker* v. *United States* (E.D. Tex., decided November 8, 1950).

[3] Congress has recently amended Section 602(f) of the National Service Life Insurance Act by adding the following:

> *Provided further*, That until and unless the Veterans' Administration has received from the insured a request

The latter provides:

> There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. *Payments from this fund shall be made upon and in accordance with awards by the Administrator.* [Italics added.]

The statute thus expressly intrusts the declaration and payment of dividends and the provision for extended values to the discretion of the Administrator.[4]

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in writing for payment in cash, any dividend accumulations and unpaid dividends shall be applied in payment of premiums becoming due on insurance subsequent to the date the dividend is payable after January 1, 1952. [Public Law 36, 82nd Cong., 1st Sess.]

It is significant that under the statute as amended veterans whose policies have lapsed before a dividend is payable will fare no better than they do under the present statute. Nor was Congress unaware that this amendment would not aid those whose policies had lapsed. A bill, H. R. 3551, was introduced in the 81st Congress which would have amended the statute to bring about the result for which petitioner contends. That bill was never reported out of committee.

[4] The statute also provides, by Section 608, that "The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this part, shall have power to make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder."

In exercising that discretion, the Administrator specifically provided that "any special National Service life insurance dividend that may be declared shall be paid in cash only" and that "unpaid special dividends shall not be available to pay premiums" (38 C.F.R. (1949 Supp.), § 8.26a). The insurance contracts were expressly made subject to the regulations of the Administrator and those regulations are entirely within the discretion given him by the statute. 38 C.F.R. (1949) § 8.108. They cannot, therefore, be upset. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, 502; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102-103; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413-414.

That the regulation governing the payment of special dividends was not promulgated until after the veteran's death is not material. At the time of his death no dividends had yet been declared; he then had, at best, an inchoate right to receive dividends when and if declared. Cf. *United States* v. *Huie*, 73 F. 2d 305 (C.A. 5). He cannot, therefore, have expected that those dividends would, when declared, be used to keep his policies alive and the regulation prohibiting the use of the dividend for that purpose cannot be said to have defeated his reasonable expectation.

But, in any event, the regulations in effect at his death (12 F. R. 2129, 38 C.F.R. (1947 Supp.) 10.3426) also provided that—as far as term insur-

ance was concerned—all dividends would be payable in cash only.[5] Only in the case of policies other than term policies could dividends be left on deposit and used to provide extended insurance, and then only at the veteran's request. This veteran did not, of course, make such a request.

2. Petitioner's second contention is that the United States, having failed to pay dividends prior to 1950 and having used the insured's "vested property" to pay benefits on other policies, is now estopped from denying that his insurance was in effect at his death. As pointed out by the court of appeals, there may be some fireside equity in the concept that instead of being distributed in cash, the money should have been used to keep the policies alive as long as possible, but as that

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[5] Section 10.3426 was promulgated March 31, 1947, and provided:

> § 10.3426 *Dividends.* A National Service Life Insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Dividends will be paid in cash except that at the request of the insured they may be left to accumulate on deposit provided the policy is in force *on a basis other than extended term insurance or level premium term insurance.* Interest on dividend accumulations will be credited annually at such rate as the Administrator of Veterans' Affairs may determine. Dividend accumulations shall not be available for the payment of insurance premiums, but will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in §§ 10.3429 and 10.3430, respectively. Any dividend accumulations not previously withdrawn will be payable at the maturity of the policy to the person entitled to its proceeds. [Italics supplied.]

court further said: "we do not see how that can be made a compulsion upon the government when the regulations under the statute, having the force of law because quite consistent with it, are so obviously based on the contrary principle" (R. 45).

When the insured let his policies lapse he possessed, as we have noted, only an inchoate right to receive dividends when and if they were declared. Cf. *United States* v. *Huie,* 73 F. 2d 305 (C.A. 5). His policies, therefore, had no reserve which could then have been used to buy extended term insurance. Nor is there any indication in the record that the insured would have chosen, if dividends had been declared prior to his death, to use the money received to keep his insurance in force. Indeed, since he let the policies lapse, the opposite inference is natural. We can fairly assume that if, in this case, the amount of dividends had not been sufficient to pay for insurance from the time of lapse to the time of the insured's death, petitioner would regard as a deprivation of property without due process of law any attempt by the Veterans Administration to declare that dividends were to be used to revive lapsed policies and keep them alive as long as possible. Her contention, therefore, must be that the whole risk in cases of this kind is placed on the United States.

Whatever considerations there may be which favor the grant by the United States of a death benefit to the families of deceased veterans, when-

ever and however they die, such a grant is not insurance. Congress chose not to grant death benefits. Instead, it made insurance, up to $10,000 per person, available to all members of the armed forces and gave them the right to keep that insurance in force after discharge. This veteran took out insurance while in service but, after discharge, he let his policies lapse. He did so, as the district court observed, despite "widespread warnings to soldiers, by veterans organizations and other agencies." (R. 12). He must be assumed to have consciously taken the risk of an untimely death. Petitioner's arguments that his insurance must now be retroactively revived, so that she may collect death benefits, are untenable.

The Government's defense is, as the court of appeals stated, "complete and unanswerable." (R. 42). No useful purpose would be served by a review, in this Court, of the decision below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
PAUL A. SWEENEY,
ARTHUR W. MURPHY,
Attorneys.

JULY, 1951.

APPENDIX

1. Sections 602(f), 605(a) and 608 of the National Service Life Insurance Act (54 Stat. 1008, 38 U. S. C. §§ 802(f), 805(a), 808) provide as follows:

> SEC. 602 (f) Such insurance shall be issued upon the five year level premium term plan, with the privilege of conversion as of the date when any premium becomes or has become due, or exchange as of the date of the original policy, upon payment of the difference in reserve, at any time after such policy has been in effect for one year and within the five year term period, to policies of insurance upon the following plans: Ordinary life, twenty payment life, thirty payment life. All five year level premium term policies shall cease and terminate at the expiration of the five year term period. Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable and practicable, may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.
>
> SEC. 605 (a) There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned

thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments from this fund shall be made upon and in accordance with awards by the Administrator.

SEC. 608. The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this part, shall have power to make such rules and regulations, not inconsistent with the provisions of this part, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this part as may be assigned to them by the Administrator. All official acts performed by such officers or employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. Except in the event of suit as provided in section 617 hereof, all decisions rendered by the Administrator under the provisions of this part, or regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by motion or otherwise any such decision.

2. Sections 8.26 and 8.26a of the Regulations of the Veterans Administration (38 C. F. R. (1949)

8.26, 38 C. F. R. (1949 Supp.) 8.26a) provide as follows:

> SEC. 8.26 *Dividends.* A National Service life insurance policy shall participate in and receive such dividends from gains and savings as may be determined by the Administrator of Veterans' Affairs. Any such dividends shall be paid in cash except that at the written request of the insured they may be left to accumulate on deposit provided the policy is in force on a basis other than extended term insurance or level premium term insurance. Payment of dividends shall be without interest except when left to accumulate on deposit in accordance with the insured's written request. Interest on dividend accumulations will be credited annually at such rate as the Administrator may determine. Dividend accumulations and unpaid dividends shall not be available for the payment of insurance premiums except at the written request of the insured made before default in payment of a premium. Any unpaid dividend on a lapsed policy will be paid in cash to the insured, if living, otherwise to his estate. Dividend accumulations will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance or the amount of paid-up insurance as provided in §§ 8.29 (a) and 8.30, respectively. Upon maturity of the policy, any dividend accumulations not previously withdrawn and any unpaid dividends will be payable in cash

to the person currently entitled to receive payments under the policy.

SEC. 8.26a *Special dividends.* Any special National Service life insurance dividend that may be declared shall be paid in cash only. Such special dividends shall not be accepted to accumulate on deposit. Unpaid special dividends shall not be available to pay premiums.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

SIDNEY MOSES,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1951

No. 115

ADELE WEISS,
Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

The Government's brief overlooks the facts as stated both in the complaint and in the opinion of the Court below.

The complaint alleges inter alia:

"That it was the duty of this defendant * * * to annually ascertain and apportion any divisible surplus on the policy" (Comp. par. 13, R. 5).

"That * * * on the 31st day of March, 1947, the * * * certificate carried both an individual reserve and a general reserve and unearned premiums and a divisible surplus" (Comp. par. 14, R. 5), and that the defendant breached or defaulted as to the duty alleged in paragraph "13" by failing " * * * to declare or pay the insured any of the aforesaid reserve, unearned premiums and/or dividends or divisible surplus" (Comp. par. 15, R. 5), " * * * with the result that on March 31, 1947, the policyholder was entitled to a considerable reserve and/or divisible surplus and unearned premiums" (Comp. par. 18, R. 6). "That the

moneys paid by the veteran for insurance if applied at the net rates agreed upon by this defendant * * * the unearned premiums, reserve and divisible surplus on March 31, 1947, was more than sufficient to pay for insurance on the face amount of the certificate for a period subsequent to the 27th day of August, 1948, * * *" (Comp. par. 20, R. 6, 7).

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 115

ADELE WEISS,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR AN ORDER VACATING THE JUDGMENT DISMISSING PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND THAT DEFENDANT'S BRIEF NOW SHOWS THAT THERE IS A QUESTION OF FACT

SIDNEY MORSE,
Counsel for Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 115

ADELE WEISS,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for a writ of certiorari in this case, entered on October 8, 1951. Rehearing is sought at this time because, as pointed out more fully in the annexed petition, the Government in its brief has shown conclusively that there is a question of fact involved, and for that reason the order of the District Court dismissing the complaint for failure to state a cause of action should be vacated and the motion be denied.

SIDNEY MORSE,
Counsel for Petitioner.

October 15, 1951.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR AN ORDER VACATING THE JUDGMENT DISMISSING PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND THAT DEFENDANT'S BRIEF NOW SHOWS THAT THERE IS A QUESTION OF FACT

Petitioner prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed June 13, 1951, and for an order vacating the judgment of the District Court dismissing petitioner's complaint for failure to state a cause of action.

Reasons for Granting a Rehearing, Issuing the Writ and Vacating the Judgment Dismissing the Complaint:

The Government, in its brief at page 9, stated:

> "* * * His policies, therefore, had no reserve which could then have been used to buy extended term insurance. * * *"

Petitioner shall now show that the Court below held that there was a reserve in the policy; Sec. 602f of the National Service Life Insurance Act as it was during the life of the veteran provided that these certificates carried a reserve, and the facts of the case conclusively show that there was a reserve in the policies.

The Court below stated in its opinion (R. 42):

> "* * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums or undeclared dividends sufficient and effective for the purpose * * *."

At page 44, the Court below stated further:

> "* * * No dividends were, however, declared for many years. Indeed this delay in the declaration of

> dividends is made one of the grounds of complaint by the plaintiff. It was explained by defendant on the ground that for the duration of the war the government's liability could not be accurately determined and thereafter it was placed in doubt by the decision in Zazove v. United States, 7 Cir., 162 F. 2d 443, which threatened to enlarge it 'by billions' until reversal on June 14, 1948 in United States v. Zazove, 334 U. S. 602. * * * "

The foregoing explains why the defendant took the entire gross surplus and placed it aside as a reserve to pay for any liability that may arise in the event the Zazove case was affirmed. When the Zazove case was reversed by this Court it was therefore unnecessary for the defendant to retain this reserve, and therefore released it and declared the first dividend on May 28, 1949, after the present action had been commenced (R. 1).

As the foregoing reserve was created from unearned premiums, those veterans who allowed their policies to lapse had an interest in this reserve proportionate to the premiums they paid towards the creation of the reserve. This interest continued from the date of lapse until the Administrator released the reserve for the declaration of dividends. The foregoing veterans, having died before dividends were declared, the rights of the parties became fixed and vested. The Government, having accepted these premiums for insurance equal to the face value of the policy, was therefore obligated by contract to give the beneficiaries of the foregoing policies insurance equal to the face value of the policy for such period as the reserve of the policy on the date of lapse would purchase.

The Court below further stated in its opinion (R. 44, 45, fol. 45):

> " * * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not

having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * * "

At R. 45, fol. 46 the Court below stated:

" * * * there may perhaps be some fireside equity in the concept that instead of cash payments available now the money should have been used to keep the main policies alive so long as possible. * * * "

At page 46, the Court below stated:

" * * * for the bearing of the cost of the United States beyond the *amount of reserve of the policy.*" (Emphasis supplied.)

Thus it has been shown that the Court below held that these policies carried a reserve. Sec. 602(f) of the National Service Life Insurance Act as it was at the time this question arose also provided that these certificates carried a reserve.[1]

It is urgently stressed upon this Court that the regulations relied on by the Court below (R. 44,[2] fol. 45 and R. 44 in the footnote of the opinion [3]) distinctly stated: " * * * will be used in addition to the reserve on the policy for the purpose of computing the period of extended term insurance * * * ".

It has therefore been shown that there is a question of fact. The beneficiaries of those veterans whose lives were shortened due to service to their country should therefore be entitled to their day in Court so that they may prove the facts of their claim.

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[1] Appendix of petition, page 10.

[2] Appendix of petition pages 11, 12.

[3] Appendix of petition page 12.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit, and for an order vacating the judgment of the District Court dismissing petitioner's complaint for failure to state a cause of action.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

SIDNEY MORSE,
Counsel for Petitioner.

MOTION FILED DEC 27 1951

Supreme Court of the United States

OCTOBER TERM 1951

No. 115

ADELE WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for a Writ of Certiorari in this case, entered on October 8, 1951. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the Government failed to state that there was an appeal pending in the Fifth Circuit involving the same state of facts as the above entitled case, which was decided December 14, 1951. Although this second petition for a rehearing is filed after the expiration of the time prescribed by Rule 33, the Court clearly has power, in its discretion, to entertain the petition. The jurisdiction of this Court is now invoked under 28 U. S. C. Section 452.

Dated, New York City, December 27, 1951.

SIDNEY MORSE,
Counsel for Petitioner.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals in the above entitled case, as prayed for in the petition of June 13, 1951.

Reasons for Granting a Rehearing and Issuing the Writ

The Government at page 5 of its brief cites the case of Parker v. United States, but failed to state the material fact that there was an appeal pending in the Fifth Circuit. This was material as it would show that there were three appeals involving the issues of the above case in different Circuits, and that this question involved herein is of National importance. The Fifth Circuit affirmed the judgment in favor of the Government on December 14, 1951.

Petitioner respectfully supplements her argument in support of question three * with the doctrine of **Helvering v. LeGierse,** 312 U. S. 531, and the doctrine of equality of risk.

Petitioner argues that where a class of veterans during their lifetime paid their contributive share of the liabilities that were charged to the National Service Life Insurance Fund, and paid the same contribution that was charged to all the other policyholders of the same age, class and equal expectation of life, they paid all the premiums required pursuant to the terms of a certificate of insurance issued on a mutual or participating basis.

Equality of Risk. "It is one of the fundamental principles in the apportionment of the cost in life insurance

* Petition, pages 8, 9.

that the same risks pay the same premium. * * * " (Handbook of Insurance, Crobaugh, page 97.)

Both the District Court and the Court below accurately stated the facts in their opinions. **If plaintiff's complaint does not state a claim, why did the Government find it necessary to misstate the facts in their brief?**

It is urgently stressed upon this Court that plaintiff's complaint is not based on dividends, as the Government stated in their brief, but rather as the Court below stated (R. 42):

> " * * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums or undeclared dividends sufficient and effective for the purpose * * *."

At page 44, the Court below stated further:

> " * * * No dividends were, however, declared for many years. Indeed this delay in the declaration of dividends is made one of the grounds of complaint by the plaintiff. * * * "

The Court below further stated (R. 44, 45):

> " * * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * * "

The complaint herein was dismissed for failure to state a claim. **The Court below affirmed the order of the District Court denying plaintiff's motion for leave to amend** (R. 42, 36, 37). Plaintiff is one of a large class of beneficiaries that fall within the aforementioned state of facts. If plaintiff cannot have her day in Court, won't this Court please grant her any one of the following remedies:

1. **Leave to serve an amended complaint** (Rule 15).
2. Leave to examine an Actuary in the employ of the defendant before trial (Rule 30).
3. Request to answer interrogatories (Rule 26a).
4. Requests for admissions (Rule 36).

Plaintiff maintains that the foregoing class of deceased veterans during their lifetime paid the same premiums that the other policyholders of the same age, class and equal expectation of life paid,* and if she is given any one of the foregoing remedies she can prove her case without a trial.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

SIDNEY MORSE,
Counsel for Petitioner.

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* Petition, pages 8, 9.

Encl